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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re L.Vad Technology, Inc.

Serial No. 78285714

Molly B. Markley of Young & Basile, P.C. for L.Vad
Technology, Inc.

Georgia Ann Carty Ellis, Trademark Examining Attorney, Law
Office 108 (Andrew Lawrence, Managing Attorney).

Before Bucher, Grendel and Drost, Administrative Trademark
Judges.

Opinion by Grendel, Administrative Trademark Judge:

Applicant seeks registration on the Principal Register
of the mark PATCH BOOSTER (in standard character form) for
International Class 10 goods identified in the application
as:

permanent and temporary heart assist devices
utilizing intra arterial air pressure to assist
the circulating assist machinery and controls
therefor; percutaneous access devices
consisting of a disk implantable beneath the

skin for use in transmitting fluid, air, or electricity through the collar and attachments therefor; implanted blood pumps and attachments therefor; and external drive units serving as pump actuators and controllers and attachments therefor.

The application is based on applicant's asserted bona fide intent to use the mark in commerce. Trademark Act Section 1(b), 15 U.S.C. §1051(b).

At issue in this appeal is the Trademark Examining Attorney's final refusal to register the mark on the ground that it is merely descriptive of applicant's goods. Trademark Act Section 2(e)(1), 15 U.S.C. §1052(e)(1). The appeal is fully briefed. No oral hearing was requested. We reverse the refusal to register.

A term is deemed to be merely descriptive of goods or services, within the meaning of Trademark Act Section 2(e)(1), if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services. *See, e.g., In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987), and *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). A term need not immediately convey an idea of each and every specific feature of the applicant's goods or services in order to be considered merely descriptive; it is enough that the term describes one

significant attribute, function or property of the goods or services. *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 1173, 71 USPQ2d 1370, 1371 (Fed. Cir. 2004); *In re H.U.D.D.L.E.*, 216 USPQ 358 (TTAB 1982); *In re MBAssociates*, 180 USPQ 338 (TTAB 1973). Whether a term is merely descriptive is determined not in the abstract, but in relation to the goods or services for which registration is sought, the context in which it is being used on or in connection with those goods or services, and the possible significance that the term would have to the average purchaser of the goods or services because of the manner of its use. That a term may have other meanings in different contexts is not controlling. *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979). Moreover, it is settled that "[t]he question is not whether someone presented with only the mark could guess what the goods or services are. Rather, the question is whether someone who knows what the goods or services are will understand the mark to convey information about them." *In re Tower Tech Inc.*, 64 USPQ2d 1314, 1316-17 (TTAB 2002). See also *In re Patent & Trademark Services Inc.*, 49 USPQ2d 1537 (TTAB 1998); *In re Home Builders Association of Greenville*, 18 USPQ2d 1313 (TTAB 1990); and *In re American Greetings Corporation*, 226 USPQ 365 (TTAB 1985).

The Trademark Examining Attorney contends that PATCH is merely descriptive of applicant's goods, and relies on three different arguments to support that contention.

First, she cites to dictionary evidence in the record defining "patch," in its noun form, as "something that covers or mends: a piece of material used to cover, strengthen, or mend a hole in something,"¹ and as "a piece of material used to mend a hole or strengthen a weak point."² She also cites to dictionary evidence defining "patch," in its verb form, as "repair something with material: to cover or mend a hole in something or to strengthen a weak place using cloth or a pasty substance,"³ and as "mend, strengthen or protect by means of a patch."⁴ She argues that "patch," so defined, merely describes applicant's goods because the goods "are used for the purpose of mending and strengthening the ability of the heart to function." (Trademark Examining Attorney's brief at 4.) She also notes that applicant, at page 5 of its brief, states that "[a]pplicant's heart pump and heart assist devices in a sense act as a patch in that they help

¹ MSN Encarta Dictionary.

² Compact Oxford English Dictionary.

³ MSN Encarta Dictionary.

⁴ Compact Oxford English Dictionary.

to keep the patient's heart working," and she argues that this statement essentially is a concession that applicant's goods function as a patch and that "patch" therefore is merely descriptive of the goods.

We disagree. Applicant's statement that its goods "in a sense" act as a patch is not a concession that "patch" is merely descriptive. Rather, we agree with applicant's contention that its goods can be deemed to be a patch only figuratively, not literally. This purely figurative significance of "patch" as applied to applicant's goods does not suffice as a basis for finding that "patch" is merely descriptive, i.e., that it immediately and directly conveys information about applicant's goods.

Second, the Trademark Examining Attorney cites to dictionary evidence of record which defines "patch" as a "cover for wound: a piece of material used to cover a wound,"⁵ as well as to excerpts of articles obtained from the NEXIS database which refer to a medical procedure involving a patch of tissue (from human and/or animal cells) used to patch a hole in the heart or to mend damaged heart tissue. Representative examples of these excerpts include the following:

⁵ MSN Encarta Dictionary.

Jessica, who is only 3 years old, has very few bruises after a medical procedure that inserted a **patch** to cover a hole in her heart - all without open-heart surgery. Doctors found the hole in her heart - called an atrial septal defect - when she was 2 years old.

The **patch**, which looks like a small, coiled white flower blossom, is made of a special type of Gore-Tex material used for medical purposes. Unlike its predecessor, which was made mostly of wire, the new **patch** is made of Gore-Tex and less wire, so it's more flexible and adaptable to the heart muscle tissues. ...

Doctors such as Javois place a catheter - a thin, flexible tube - into the largest vein in the leg to carry the **patch** to the heart, where it is placed to cover the hole.

(Chicago Sun Times, May 30, 2003);

...Melanie rallied enough that the cardiologists decided the time had come for immediate surgery to **patch** her heart. By closing the hole, it would decrease the amount of blood flowing to her lungs, which was already three times as much as it should have been. ...

(The Times (Albany, NY), November 18, 1994);

The recipe for growing a **patch** of heart tissue in the bioreactor begins with 54 million or so individual mammalian heart cells. ...

It takes about one week for the bioreactor to produce a **patch** of tissue 5 mm in diameter and a mere 0.10 mm thick. The heart tissue **patch** acts just like real heart tissue and beats spontaneously.

(Aerospace America, July 2002); and

HEADLINE: Local Bioengineers Want to Build **Patch** for Heart

BODY: Local scientists are working on a tissue engineering project that could one day allow doctors to repair a damaged heart with a

bioengineered blood vessel or a **patch** of cardiac muscle. ...

To make the engineered blood vessels and heart **patches**, the researchers have created a biodegradable polymer "scaffold" that is flexible and porous. ...

The challenge is that the cardiac **patch** should be able to contract with the healthy heart muscle and replacement blood vessels should be able to dilate and constrict like the real thing. ...

The researchers have been working with a **patch** that's about a third of an inch wide and aim to be testing a quarter-sized **patch** in large animal studies by the end of the five-year grant period. It could ultimately be used to strengthen scarred, nonfunctioning areas of heart muscle that have been damaged by a heart attack. ...

(Pittsburgh Post-Gazette, August 5, 2003).

These articles do not support a finding that "patch" is merely descriptive of applicant's goods. There is no evidence in the record from which we might conclude that applicant's goods, as identified in the application, are, or involve, tissue patches of the type mentioned in these articles.

The Trademark Examining Attorney's third argument in support of her contention that "patch" is merely descriptive of applicant's goods is based on dictionary evidence in the record which defines "patch" as "drug-impregnated material: a piece of material impregnated with a drug and worn on the skin to allow the gradual absorption

of the drug - a *nicotine patch*,⁶ and as "an adhesive piece of drug-impregnated material worn on the skin so that the drug may be gradually absorbed."⁷ She also cites to the following NEXIS evidence showing this usage of the term:

You've heard of the nicotine **patch** for smokers? The estrogen **patch** for menopausal women? The nitroglycerine patch for heart patients? Now there's an anti-wrinkle **patch**. (The Vancouver Sun (British Columbia), August 1, 1998);

...Alza makes what it calls drug-delivery **patches** - small adhesive **patches** worn by the patient that work like an intravenous infusion, but without the needle. The patches consist of a thin system of layered membranes: an impermeable backing, a minute drug reservoir, a rate-controlling membrane and an adhesive surface that keeps the **patch** on the skin. ...

And Alza's popular Transderm Nitro, a **patch** for heart patients, is being challenged by a similar product from Key Pharmaceuticals Inc., of Miami.

(PC Week, March 18, 1986).

Finally, she cites to the following dictionary definitions of "percutaneous": "passed, done, or effected through the skin,"⁸ and "performed through the skin, as injection of radiopaque material in radiological examination, or the

⁶ MSN Encarta Dictionary.

⁷ Compact Oxford English Dictionary.

⁸ The American Heritage Dictionary of the English Language (4th ed. 2000).

removal of tissue for biopsy accomplished by a needle. *Cf. transdermal.*"⁹

Based on this evidence, the Trademark Examining Attorney argues that those goods identified in the application as "percutaneous access devices consisting of a disk implantable beneath the skin for use in transmitting fluid, air, or electricity through the collar and attachments therefor," although they might not be "the conventional type of 'patch' goods, such as the very commonly known nicotine or birth control type patches," nonetheless "function exactly the same as these other patches because the goods have the capacity to introduce substances [including medical fluids, i.e., medicine] into the body via a device under the skin." (Trademark Examining Attorney's brief at 4-5.)

We are not persuaded by this argument. Even assuming that applicant's goods identified as a "disk implantable beneath the skin" are used or can be used to transmit medicine into the body, just as a "patch" does, we cannot conclude that "patch" merely describes the goods. Significantly, applicant's disk is implanted beneath the skin; it is not adhered to the skin like the patches

⁹ Dorland's Illustrated Medical Dictionary.

identified in the dictionary and NEXIS evidence of record. There is no evidence that medication delivery devices implanted beneath the skin are called "patches." It is not enough, even if true, that applicant's goods could be used to deliver medicines like a "patch" does. On this record, "patch" has a particular connotation, that of a drug delivery device that is adhered to the skin, not one which is implanted beneath the skin.

In short, we are not persuaded by any of the Trademark Examining Attorney's three arguments in support of her contention that "patch" is merely descriptive of applicant's goods. Applicant's goods do not comprise or involve a "patch" of the types identified in the evidence (i.e., a heart tissue patch or a medication skin patch). That applicant's goods might figuratively be viewed as a "patch" for the heart does not suffice to render the term merely descriptive of the goods. We find that the term is at most suggestive of the goods.

We also find, on this record, that the word BOOSTER is at most suggestive, rather than merely descriptive, of applicant's goods. The Trademark Examining Attorney relies on dictionary evidence showing that "booster" is defined as

"something which improves or increases something,"¹⁰ and she argues that the word is merely descriptive of applicant's goods because the goods "are used to boost the ability of the heart to work." (Trademark Examining Attorney's brief at page 6.) We find, however, that this significance of the word "booster," as applied to applicant's goods, is too vague and generalized to be deemed merely descriptive of the goods. We note that the record also includes a reference to a heart "booster pump" in an August 12, 1971 New York Times Abstracts news article (see *infra*) concerning applicant's goods. We find, however, that this isolated reference does not suffice to establish that "booster" would be perceived today as a merely descriptive term in connection with applicant's goods.

In addition to finding that "patch" and "booster" are at best suggestive of applicant's goods, we also find that the composite created by combining the two words is suggestive, not merely descriptive. "Patch booster" would seem to have two possible grammatically correct constructions, neither of which appears to make sense as applied to applicant's identified goods. Whether the composite is viewed to mean "a patch which boosts," or is

¹⁰ Cambridge Advanced Learner's Dictionary (2004).

viewed to mean "a booster for a patch," the construction is awkward and does not directly describe applicant's goods, which do not involve a "patch" as that term is defined in the record (i.e., a heart tissue patch or a medication skin patch).

Finally, we acknowledge that the record includes evidence of four instances of use of the designation "patch booster." Applicant asserts that each of these instances of use are in reference to applicant's goods, and that Dr. Kantrowitz is a principal of applicant. The instances of use are as follows:

Sinai Hosp, Detroit, drs led by Dr A Kantrowitz implant permanent, partly mechanical booster pump in H Shanks, 63-yr-old man suffering from congestive heart failure: device, known as **patch booster**, was inserted during 5-hr operation; is air powered and can be used as long as required; is made of silicone rubber and Dacron, is 6 inches long and 1 ¼ inches wide and is powered by 8-lb portable driving unit powered by batteries mounted on belt ...

(New York Times Abstracts, August 12, 1971);

H Shanks, recipient of **patch booster**, permanently implanted mechanical heart pump, dies of complications stemming from kidney failure, Sinai Hosp, Detroit

(New York Times Abstracts, November 15, 1971);

Dr A Kantrowitz says he and his Detroit team have modified their partly mechanical heart device and are preparing 4 persons with chronic

heart disease for implantation with pump-controlled balloon, meeting, NYS Med Soc; modifications follow intensive study of cause of death of H Shanks, who recd permanently implanted mechanical heart pump at Sinai Hosp in Aug '71; pump worked, but Shanks died 3 mos later from kidney failure following massive doses of antibiotics to counteract chest infection that developed as complication of surgery; modifications, designed to eliminate cause of infection, described; device, known as **patch booster**, does not replace natural heart; device described...

(New York Times Abstracts, February 17, 1972);

and, from an online article entitled "The 25 Landmark
'Milestone' Papers Published by ASAIO 1955-2003"

(echo.gmu.edu/bionics/Toppapers5.htm):

I was very fortunate to train with Dr. Adrian Kantrowitz. Dr. Kantrowitz pioneered the development and implantation of temporary and permanent heart pumps - devices that, to date, have saved many thousands of lives. ... As I remember, one afternoon in 1967, Dr. Kantrowitz called me and said, "Steve, we're ready to implant the balloon pump in a patient." ... From its initial clinical use, over 37 years ago, to its current extensive use of over 100,000 times annually in the US alone, the balloon pump, developed and pioneered by Dr. Adrian Kantrowitz, remains the first choice intervention for mechanical circulatory assistance. A permanent balloon pump, (the experimental **patch booster**), was commercialized as the CardioVad System and successfully implanted in a number of patients. ...

We are not persuaded that this evidence of use of the designation "patch booster" in connection with applicant's

goods, whether considered by itself or in connection with the other evidence of record, establishes the mere descriptiveness of the designation as applied to applicant's goods. These are isolated instances of use spread over thirty-five years, and we therefore accord these articles little or no probative value as evidence of how the designation "patch booster" is or would be perceived today. Moreover, these instances of use of "patch booster" are somewhat nebulous, to the extent that they may be the writer's attempt to refer to the trademark of applicant's specific product, i.e., "known as patch booster." If the term were in fact merely descriptive as applied to applicant's goods or competitors' similar goods, we would expect to see more numerous and more clearly descriptive usages of the term in the press and the literature in the thirty-plus years since the appearance of the articles quoted above. The paucity of the evidence of use of the term "patch booster" weighs against a finding of mere descriptiveness.

In summary, we find that the evidence of record does not support a conclusion that PATCH BOOSTER is merely descriptive of applicant's goods. To the extent that any doubts might exist as to the mere descriptiveness of applicant's mark, we resolve such doubts in favor of

applicant and in favor of publication of the mark for opposition. See *In re Grand Forest Holdings Inc.*, 78 USPQ2d 1152 (TTAB 2006); *In re Grand Metropolitan Foodservice Inc.*, 30 USPQ2d 1974 (TTAB 1994).

Decision: The refusal to register is reversed.

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Bucher, Administrative Trademark Judge, concurring:

I agree that the combined term, PATCH BOOSTER, is not merely descriptive of this device. Since Dr. Kantrowitz first implanted a similar device in a patient with terminal heart failure in 1971, it seems no one else has used this combination of terms. Nonetheless, those knowledgeable about these goods will understand the etymology of each individual word. This left ventricular assist device helps patients with severe chronic congestive heart failure by permitting the failing heart to work more effectively - assisting the circulation by diastolic augmentation. The patient can turn the device off and disconnect the external power source for minutes or hours. The involved item has three main parts as set out in the identification of goods.

① In the accompanying picture one can see illustrated the

inflatable polyurethane bladder which has been sutured to replace an excised portion of the aorta, making it an "aortic patch." This is a patch in the general sense that it 'covers a hole' made by a surgeon in the



lateral aspect of the descending thoracic aorta. ② This is a connector through which the patch, or internal portion of the pumping mechanics, connects to an external power source. This collar is a percutaneous access device designed to provide a through-the-skin coupling between the implanted, dynamic aortic patch and the external unit. ③ This is the external drive unit that operates the pump.

As noted by the majority, the word BOOSTER has meaning in that this entire device, given its augmentation function, appears to serve the patient as a "booster pump."

However, even if the word PATCH conveys information about the nature of the implanted balloon pump portion of the device, and even if the word BOOSTER conveys information about the function of the entire device, I agree with applicant's alternative position herein, that when these two arguably descriptive words are combined, the

¹¹ The image was taken from applicant's website and introduced into the record by the Trademark Examining Attorney. This author has added the numbers 1, 2 and 3 to clarify the three portions of applicant's identified device.

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composite appears to be nothing more than suggestive of the device. As noted by the majority, to the extent we have doubt, we must resolve such doubt in favor of applicant.